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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 975

JAMES HENRY AUDETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. i-xvii; R. 147-163) is reported at 265 F.2d 837.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1959 (R. 164). A petition for rehearing was denied on May 4, 1959 (R. 165). The petition for a writ of certiorari was filed on June 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to permit a United States Commissioner to act as co-defense counsel in representing one accused of committing a federal crime, where the accused waived any objection he might have in this respect through a written waiver addressed to the United States Attorney and a statement to such effect in open court.

2. Whether this Court should announce a new rule that one accused of committing a crime cannot be convicted on the uncorroborated testimony of purported accomplices, where the facts show corroboration of the testimony of the purported accomplices.

3. Whether the court below erred in sustaining petitioner's 20-year prison term for unlawful entry of a national bank, while striking petitioner's 10-year concurrent prison term for a completed larceny in the bank.

STATUTES INVOLVED

18 U.S.C. 2113 provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used,

any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; * * *

* * * *

28 U.S.C. 604 provides in pertinent part:

(a) The Director shall be the administrative officer of the courts, and under the supervision and direction of the Judicial Conference of the United States, shall:

* * * *

(6) Determine and pay necessary office expenses of courts, judges, and those court officials whose expenses are by law allowable, and the lawful fees of United States Commissioners;

(7) Regulate and pay * * * necessary travel and subsistence expenses incurred by judges, court officers and employees, and officers and employees of the Administrative Office, while absent from their official stations on official business;

* * * *

(9) Purchase, exchange, transfer, distribute, and assign the custody of law books, equipment and supplies needed for the maintenance and operation of the courts and the Administrative

Office and the offices of United States Commissioners;

* * * *

28 U.S.C. 607 provides:

> An officer or employee of the Administrative Office shall not engage directly or indirectly in the practice of law in any court of the United States.

28 U.S.C. (Supp. V) 633 provides in pertinent part:

> (c) United States commissioners who are required to devote full time to the performance of the duties of the office, as determined by the Director of the Administrative Office of the United States Courts under the supervision and direction of the Judicial Conference of the United States and who do not engage in the practice of the law, shall be allowed their actual and necessary office expenses, including the compensation of a necessary clerical assistant. Such office expense shall be determined and paid and such compensation shall be fixed and paid by the Director of the Administrative Office of the United States Courts under the provisions of section 604 of this title.

28 U.S.C. 955 provides:

> The clerk of each court and his deputies and assistants shall not practice law in any court of the United States.

STATEMENT

A two-count indictment charged the petitioner with entering a national bank with the intent to commit

larceny, and larceny of the bank's property in violation of 18 U.S.C. 2113(a) and (b) (R. 3-4). Two accomplices pleaded guilty to similar charges (R. 59, 90) and testified for the government. Following a trial by jury held in the United States District Court for the District of Idaho, petitioner was found guilty on both counts. He was sentenced to twenty years imprisonment on the entry count and ten years on the larceny count, the sentences to run concurrently (R. 15). The court of appeals modified the judgment by striking the sentence imposed on the larceny count and, as modified, affirmed it (R. 164).

The pertinent facts are as follows:

During the evening of October 28, 1953, following two unsuccessful attempts to burglarize two other banks (R. 45-46, 67-69, 77-78, 98), petitioner and two others gained access into the First National Bank of Cottonwood, Idaho. While inside, they carved a hole through the top of the bank vault, lowered themselves into the vault and began to rifle through the safe-deposit boxes (R. 50-51, 92-93). After several hours inside the bank, they left by boring a hole through the rear wall of the bank adjacent to a warehouse, and opened a door which led to an alley (R. 113). They took with them a quantity of gold dust, jewelry, gold in vials, and approximately $27,000.00 worth of currency, which was divided among the petitioner and the two others (R. 55, 86-87, 103-105).

The tools used inside the bank, along with the rope hanging from the skylight through which the initial access of one accomplice was gained, were left inside the bank (R. 54, 95-96). The accomplices identified

these implements either as their own or similar to those used inside the bank (R. 56-59, 105-106).

Mr. Dean E. Miller, one of the two defense attorneys for the petitioner at his trial, was also serving as a United States Commissioner at that time (R. 37). Petitioner, in a letter written by one of his attorneys to the United States Attorney, as well as in open court, waived any question as to the appearance of Mr. Miller as his counsel (R. 9, 37).

In the instructions to the jury, the judge charged that the testimony of an accomplice is to be received with caution and weighed with great care, and that "while it is true that a jury may convict on such testimony alone, yet the jury should not rely on it unsupported for a conviction, unless it produces in their minds a positive conviction of its truth" (R. 139).

ARGUMENT

1. Petitioner contends that, notwithstanding his earlier waivers, he was denied proper representation by counsel, since one of his defense counsel was also serving as a United States Commissioner. Petitioner points to the fact that 28 U.S.C. 604 provides that the Director of the Administrative Office of the United States Courts pay the expenses of courts and commissioners, and that the provisions of the United States Code relating to the United States Commissioners are found in Part III of the Code entitled "Court Officers and Employees". On this basis, he argues that the United States Commissioners are within the proscription of 28 U.S.C. 607, which prohibits officers and employees of the Administra-

tive Office from the direct or indirect practice of law. These contentions are devoid of merit.

Part III of the Judicial Code contains nine chapters, with separate chapters for the Administrative Office of the United States Courts, the United States Commissioners, and court employees generally. The ban on the practice of law in 28 U.S.C. 607, which is included in Chapter 41 entitled "Administrative Office of United States Courts", applies only to officers or employees in the Administrative Office. Indeed 28 U.S.C. 607 expressly so states. That Section 607 was not intended to apply to all types of employees covered by Part III is shown by the fact that there is specific provision against the practice of law by court employees in Chapter 57, 28 U.S.C. 955. Congress was obviously aware that some United States Commissioners practice law outside of their official duties, and impliedly sanctioned the practice since 28 U.S.C. 633(c) provides for the necessary and actual office expenses of full time United States Commissioners "who do not engage in the practice of the law". See H. Rep. No. 1360, 83d Cong., 2d Sess.[1] If

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[1] "A Commissioner pays out of the earned fees his expenses for clerical help, telephone, office supplies, and rent, if he is not situated in a Federal building.

"There are about 650 Commissioners throughout the country, most of whom serve part time because of little business, but in the large metropolitan areas the volume is so great as to require full-time attendance, which results in increased expenses.

"Under the proposed bill a full-time Commissioner who does not practice law would be permitted to receive the actual and necessary office expenses he incurs including the cost of a clerical assistant." * * * H. Rep. No. 1360, 83d Cong., 2d Sess., p. 2.

United States Commissioners were prohibited from the outside practice of law, the provision in the statute, "and who do not engage in the practice of the law," would have no meaning. 28 U.S.C. 633(c).[2]

Furthermore, petitioner has no standing to complain of the dual capacity of his co-defense counsel in view of his written and oral waiver in open court, both of which are set out verbatim by the court below (R. 152-154). This Court has indicated that it would uphold waivers of rights more pervasive and fundamental than the mere possibility of an unconscious conflict of interest here involved. See *Schick* v. *United States*, 195 U.S. 65, 72; *Johnson* v. *Zerbst*, 304 U.S. 458, 465, 467-468. Since the petitioner was represented by counsel in addition to Mr. Miller at the time the waivers were made, and since the petitioner does not mention, let alone argue, that he did not understand the nature of his waiver, a competent and intelligent waiver of objection to Mr. Miller's dual role was made. *Johnson* v. *Zerbst*, *supra*, at 465, 468.

2. Petitioner contends that this Court should establish the rule that a conviction cannot be sustained on the uncorroborated testimony of accomplices. This

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[2] There is no merit in the petitioner's contention that the United States Commissioners are officers or employees of the Administrative Office of the United States Courts because the Director of the Administrative Office exercises some control over the fees, acquisition and distribution of law books, supplies and equipment for the United States Commissioners. The same reasoning would make judges of the various United States courts officers or employees of the Administrative Office, for the Administrative Office pays the office expenses of the judges and the costs of their books and equipment. 28 U.S.C. 604(a) (6) (7) (9).

contention runs counter to the federal rule which does not require such corroboration. *Poliafico* v. *United States*, 237 F. 2d 97, 115 (C.A. 6), certiorari denied, 352 U.S. 1025; *Johns* v. *United States*, 227 F. 2d 374, 375 (C.A. 10); *Duke* v. *United States*, 255 F. 2d 721, 729 (C.A. 9), certiorari denied, 357 U.S. 920; *McClanahan* v. *United States*, 230 F. 2d 919, 922 (C.A. 5), certiorari denied, 352 U.S. 824; *Benedicto Lebrón* v. *United States*, 241 F. 2d 885, 887 (C.A. 1), certiorari denied, 354 U.S. 911. See *Caminetti* v. *United States*, 242 U.S. 470, 495. The trial judge instructed the jury that they could convict the petitioner on the evidence of the accomplices alone, but that such evidence was to be received and examined with care (R. 139). In so instructing the jury, the trial judge followed the practice approved by this Court. *Holmgren* v. *United States*, 217 U.S. 509, 523-524; *Caminetti* v. *United States*, *supra*, at 495.

Moreover, although the evidence linking the petitioner with the offense was supplied solely by the two accomplices, the testimony of the accomplices respecting the attempted burglary in Colton, Washington, the burglary of the Cottonwood bank, together with the manner of entry, articles removed, tools used, etc., was corroborated by other testimony (R. 112-113, 118-120, 130-131). As there is substantial evidence to support the verdict, the petitioner has no cause for complaint. *Caminetti* v. *United States*, *supra*, at 495-496; *Glasser* v. *United States*, 315 U.S. 60, 80.

3. Petitioner contends that his sentence should be imposed on Count II (for violation of 18 U.S.C. 2113

(b)), charging the larceny which carries a 10-year maximum imprisonment sentence, and not on Count I (for violation of 18 U.S.C. 2113(a)), charging the unlawful entry which carries a maximum of 20-years' imprisonment. The precise question presented here—whether a court may impose sentence within the maximum permissible for entry into a bank with intent to commit a felony, where the entry is followed by a completed larceny—was twice before this Court on petitions for writs of certiorari to review the judgments, in accord with that below, of the Fifth Circuit in *United States* v. *Williamson*, 255 F. 2d 512, certiorari denied, 358 U.S. 941 (No. 313 Misc., this Term) and of the Tenth Circuit in *Purdom* v. *United States*, 249 F. 2d 822, certiorari denied, 355 U.S. 913 (No. 603, O.T. 1957). We respectfully refer the Court to the government's briefs in opposition in those cases. The Eighth Circuit has also ruled in accordance with the decision below. *Kitts* v. *United States*, 243 F. 2d 883; *La Duke* v. *United States*, 253 F. 2d 387. There is no conflict of circuits on this issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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